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No. 88-848

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN MINING CONGRESS,
THE ALUMINUM ASSOCIATION, AND KENNECOTT,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND,
HAZARDOUS WASTE TREATMENT COUNCIL,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and LEE M. THOMAS, ADMINISTRATOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS ENVIRONMENTAL DEFENSE FUND AND HAZARDOUS WASTE TREATMENT COUNCIL BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

The Environmental Defense Fund and the Hazardous Waste Treatment Council were granted their petitions for review of EPA's regulatory action by the court of appeals. The regulatory history is recounted in some detail in the opinion of the court of appeals. For the convenience of the Court (and because that history is largely obscured in the Petition), we summarize below the salient elements of that history and the decision of the court of appeals.

Regulatory History

In 1976, the Resource Conservation and Recovery Act directed the Environmental Protection Agency to promulgate regulations identifying hazardous wastes that would be subject to regulation under Subtitle C of that Act. In promulgating those regulations, EPA was directed to take into account various criteria including "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." 42 U.S.C. 6921(a). EPA is directed to control the "treatment, storage, and disposal" of those wastes. 42 U.S.C. § 6924.

In December 1978, EPA proposed regulations to govern the management of hazardous wastes under RCRA Subtitle C. At that time, EPA proposed to give certain wastes—wastes that were generated in "very large volumes" but were thought to pose "relatively low" hazards—special treatment. These wastes would be subject to fewer regulatory requirements because, as high volume/low hazard materials, they were not amenable to conventional control techniques. Among these special wastes were wastes from the "extraction, beneficiation, and processing of ores and minerals." *See* 43 *Fed. Reg.* 59016 (1978). Pet. App. at 48a.

In the final regulations, however, there was no express exception for these "special wastes," *i.e.*, "high volume/low hazard" wastes, because EPA concluded that under its proposed definition of hazardous waste fewer of the special wastes would be subject to regulation, and because under the proposed management standards they could be handled more flexibly than initially proposed. 45 *Fed. Reg.* 33173-75 (1980). Pet. App. 51a-52a. Shortly thereafter, the agency identified six hazardous wastes from *smelting* operations that did pose a "substantial present or potential hazard to human health." 45 *Fed. Reg.* 47832-34 (1980). Pet. App. at 53a-54a.

Before the final regulations were to take effect, Congress passed what is known as the Bevill Amendment, adding two provisions to RCRA. Borrowing the language that EPA had initially proposed, the Bevill Amendment directed a study of "solid waste from the extraction, beneficiation, and processing of ores and minerals," 42 U.S.C. § 6982(p), as well as several other types of "special wastes" as classified by EPA in 1978. Until the study was completed, EPA was directed not to apply RCRA Subtitle C regulations to such solid wastes. 42 U.S.C. § 6921(b)(3)(A).

As a "temporary accommodation to the requests" of the mining industry, EPA determined that it would *temporarily* exclude from regulation (for 90 days) those wastes that resulted from *smelting* and *refining* of ores and minerals, noting that in so doing it might be extending the Bevill Amendment farther than Congress intended. Pet. App. 7a. Specifically, it "temporarily" excluded from control under Subtitle C of RCRA the six smelter wastes that had been listed as hazardous wastes and are the subject of this suit. In so doing, EPA stated that it needed time to evaluate the scope of the Bevill Amendment.

After a period of delay, and litigation concerning that delay, EPA set forth its considered interpretation of the Bevill Amendment in 1985. 50 *Fed. Reg.* 40292-301 (1985). Pet. App. at 60a-68a. EPA concluded that the Bevill Amendment exclusion was only intended to apply to the types of high volume, low hazard wastes that had been deemed "special wastes" in EPA's 1978 proposed regulations. EPA expressly conceded that it had been "incorrect" in 1980 when it temporarily accepted the interpretation of the mining waste exclusion as encompassing all wastes from primary smelting and refining. Pet. App. at 65a.

In particular, the six hazardous smelter wastes—wastes that were neither generated in large quantities

nor minimally hazardous—which had previously been subjected to regulation (but which had been *temporarily* suspended from regulation under the temporary accomodation to the mining industry noted above) were to be relisted.

One year later, EPA undertook the action that prompted this suit and is the focus of the petition. 51 *Fed. Reg.* 36233 (1986). Pet. App. 70-73a. EPA announced that it was withdrawing its proposed reinterpretation of the scope of the Bevill Amendment and the listing of the smelter wastes. While continuing to hold to its view that the Bevill exclusion should apply only to "high volume/low hazard" wastes, the agency indicated that it was unable adequately to define and quantify the terms "high volume" and "low hazard" sufficient to allow it to apply the terms to various new nominees to that category. More pertinent to the instant petition, "although EPA never contended that the six hazardous smelter wastes were even arguably 'high volume, low hazard' wastes within the scope of the Bevill Amendment, EPA withdrew its proposal [pending EPA's attempt to grapple further with the general problem of defining the contours of the Bevill Amendment] to relist those wastes so that they would continue to enjoy the protection of the Bevill exclusion." *See* Pet. App. at 14a.

The Opinion Below

On review of the agency's action, the court of appeals found this latest withdrawal from the list unlawful. After reviewing the language, the context, and the legislative history of the Bevill Amendment, the court concluded that it had been enacted with direct reference to the concept of "special waste," *i.e.* "high volume and low hazard" wastes that were "generated in very large volumes, were thought to pose a relatively low hazard, and were not necessarily amenable to the management standards proposed for hazardous waste treatment, storage, and disposal facilities." Pet. App. at 23a. The court

noted that all of the other wastes singled out for exclusion by the Bevill Amendment were large volume wastes and that "solid waste from the *extraction*" and "solid waste from the *beneficiation* of ores" also clearly concerned large volumes. The court therefore concluded that while the dictionary definition of the words "processing of ores" did not necessarily refer only to large volume, nonsmelting wastes, the structure and language of the Bevill Amendment as a whole, including the other types of wastes within the scope of the amendment, strongly suggested that it should be interpreted to refer only to wastes of that type.

To the extent there was any ambiguity in the plain language of the Amendment, the court had little difficulty resolving that ambiguity by resort to the legislative history. "The legislative history establishes that the key to understanding Congress' intent is the concept of 'special waste' articulated in the regulations proposed by EPA on December 18, 1978, following enactment of RCRA." Pet. App. at 23a. The Bevill Amendment was viewed by Congress as "a direct response to EPA's 1978 proposed regulations and was designed to suspend the Agency's regulation of 'special wastes' pending further study." Pet. App. at 24a-25a. The court noted numerous references to the "high volume, low toxicity wastes" in the course of the congressional debates. Thus, the court concluded that:

> "Congress did not intend the mining waste exclusion to encompass all wastes from primary smelting and refining. On the contrary, Congress intended the term 'processing' in the Bevill Amendment to include only those wastes from processing ores or minerals that meet the 'special waste' criteria, that is, 'high volume, low hazard' wastes."

Pet. App. at 25a. The court noted that EPA itself had not suggested that the court adopt a contrary interpretation and, in light of that determination, concluded that

EPA's withdrawal of the six hazardous smelting wastes was arbitrary, capricious, and contrary to law. Pet. App. at 27a.

The court held that while the agency may indeed have had difficulty formulating a general definition of "special wastes," there was no question that the six smelting wastes would not fall within any definition that the agency might ever construct; indeed, since 1980 they had been viewed as beyond any such definition precisely because they were "*low* volume and *high* hazard." Pet. App. at 27a. "Regardless of the status of any additional wastes" and the agency's need to refine and clarify its approach in grey areas, these wastes were clearly not within the reach of the Bevill Amendment and thus necessarily were regulated.[1] The agency's asserted rationale for withdrawing them from the list—that it felt "uncomfortable" with the partial step of removing the six hazardous wastes from the Bevill exclusion without coming up with a solution as a whole—simply did not suffice, eight years after concluding that these wastes were not "high volume, low hazard" wastes, to justify the agency's action. Pet. App. at 28a.

REASONS FOR DENYING THE WRIT

The instant petition raises no novel or important question of law, nor any issue upon which the courts of appeals have divided,[2] nor upon which this Court has rendered directions contrary to those followed by the

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[1] EPA had already been directed by the district court in the *Adamstown* case to complete the Bevill study of mineral processing wastes, and take final action on the six smelter wastes, but EPA decided instead to continue the "temporary" suspension for these wastes.

[2] Nor is there any prospect of disagreement among the courts of appeal on this issue in the future because Congress has designated the D.C. Circuit as the exclusive venue for judicial review of regulations promulgated under RCRA. 42 U.S.C. § 6976(a).

court below. On the contrary, the petition presents an issue of statutory construction, limited to the precise language and scope of the Bevill Amendment, which sets forth a limited exception to the general terms of the Resource Conservation and Recovery Act. Indeed, in regard to the second question presented, the petition's significance is limited still more, extending no farther than the handling of six specific types of smelting waste under that amendment. The opinion below does not discuss, and the petition does not raise, any general jurisprudential issue worthy of this Court's attention.[3] Petitioners do not suggest that the questions they present have been anything less than finally settled by the decision below.

Petitioners' first argument goes no farther than to suggest that the decision below was wrong. Although the petition seeks to dress up that assertion by characterizing the decision as departing from the plain language of the statute, the petition is unsuccessful even in this. The issue for the court below (as for EPA) was whether the kinds of low volume, high hazard wastes that arise from smelting operations somehow fit within the Bevill Amendment's exclusion for the "processing" of ore. To be sure, "as a concession to the mining industry," the EPA had at one time temporarily appended to its regulatory interpretation of the Bevill Amendment a broad exclusion for smelting wastes so as to include the types of waste at issue here. At all times, the issue was whether low volume/high hazard smelting wastes could be smuggled into the exclusion set forth under the Bevill Amendment for processing wastes. Pet. App. at 60a.

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[3] This is a case in which the agency and the court below agree upon the meaning of the Bevill Amendment (*i.e.* that it involves only "high volume, low hazard" wastes.) Although EPA was the respondent below (and is theoretically aggrieved by the judgment below), the Solicitor General has neither petitioned for certiorari nor joined in intervenor's petition. Indeed, the Solicitor General has opposed the petition for certiorari.

The court of appeals concluded that the fact that all the other exclusions set forth in the Bevill Amendment concerned high volume/low hazard wastes strongly suggested that the *low* volume/*high* hazard wastes associated with smelting did not fit under the statutory term "processing."[4] In short, it appears that in the context of the legislative text as a whole, the intended meaning of "processing" was clear; but at worst, the meaning was ambiguous (as EPA had acknowledged) allowing recourse to legislative history to resolve the definitional problem.

In sum, the decision below is plainly correct both in the method of analysis and in its result.

With respect to the second issue presented by the petition—that the court below should not have reached the issue whether the six smelting wastes fall within the terms of the Bevill Amendment, *see* Pet. at 16—suffice it that this was the very issue that had been presented for review. EPA had determined these wastes to be hazardous and *not* to be high volume, low hazard wastes as early as 1978. EPA did not suggest to the contrary below. Pet. App. at 70a-73a. EPA had listed them for regulation in 1980. It was the withdrawal from the list —without reason except for the fact that EPA felt "uncomfortable"—that the court of appeals held objectionable.

The petition erroneously asserts that EPA has relisted the six smelter wastes without determining whether

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[4] Inexplicably, and misleadingly, in a footnote, Petitioners assert that "the precise definition of 'processing' was unnecessary to the court's holding; the court repeatedly acknowledged that the six wastes are indeed 'processing' wastes." Pet. at 13 n.50. The court of appeals did no such thing. The court was usually careful to distinguish the smelter wastes from processing wastes covered by the Bevill Amendment. When the court referred to processing wastes generally, it did so with respect to the interpretational problems presented by EPA's shifting positions.

Subtitle C regulation of the wastes was warranted or whether the wastes are "high volume, low hazard" wastes. The fact is EPA listed these smelter wastes as hazardous wastes under RCRA in 1978 on the basis that such wastes are indeed hazardous, and do not fit the special waste category. Moreover, in a portion of EPA's relisting notice not reproduced in the Petitioners' Appendix, EPA states:

> "Since the issuance of the Court's opinion, EPA has conducted a review of some of the waste characterization data received since 1980. While EPA did not, in light of the short time-frame for publication of this rule, exhaustively evaluate all of the post-1980 waste characterization data submitted, the review that was conducted tends to corroborate and confirm that the six waste streams meet the criteria for hazardousness found in section 3001(a) of RCRA. EPA's review suggests that no data have been submitted which would clearly contradict EPA's 1980 decision to list the six smelter wastes, *i.e.*, no data are available to refute the basic conclusion that these wastes contain significant concentrations of toxic constituents and that the constituents are mobile and persistent. Therefore, EPA continues to believe that each of these wastes meets the criteria for listing as hazardous waste found at 40 C.F.R. 261.11 and sees no reason not to resume the 1980 listings of these six wastes at this time."

53 *Fed. Reg.* 35417 (Sept. 13, 1988).

Not only has EPA reaffirmed the correctness of its 1980 conclusion that the six smelter wastes are hazardous, but it also has determined that none of the six wastes would satisfy the "high volume" criteria EPA has recently reproposed. When it proposed its redefinition of the scope of the Bevill Amendment in October, 1988, EPA expressly noted that "none of the six smelting wastes that were recently relisted as hazardous wastes satisfy the high volume criteria described here." 53

Fed. Reg. 41288, 41296 (Oct. 20, 1988). Pet. App. at 94a. Thus, EPA's expert judgment concerning the application of the Bevill Amendment to the six smelting wastes has not in any way been preempted by the decision below.

Therefore, on this issue as well, the court of appeals' remedial approach was entirely correct and certainly did not deviate from ordinary practice or break new ground in a way worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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